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No. 95-414

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CIG EXPLORATION, INC.,
Petitioner,

v.

UTAH STATE TAX COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

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REPLY BRIEF OF PETITIONER

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The oppositions filed by respondents, the Utah State Tax Commission (the "State") and Uintah County (the "County") (collectively "Utah"), concretely illustrate why it is of such vital importance for the Court to grant review in this case and deter individual states from interfering with the nationwide regulation of natural energy resources.[1] Respondents concede that the FERC has plenary

[1] The State's assertion that petitioner did not raise the issue it has presented to the Court, State Opp. at 8, is simply wrong. *Every* single brief filed in this case by *each* of the parties, both before the Uintah County District Court and the Utah Supreme Court, discusses the FERC Order finding that petitioner was not authorized to charge incentive prices for high-cost gas. In addition, petitioner has consistently argued in all of its briefs that this FERC Order affected the proper assessment of the state's *ad valorem* tax. *See, e.g.*, Appellant's Br. at 26 ("1. *Exploration's property was erroneously overvalued as a result of . . . FERC's Order No. 306 which required Exploration to refund a portion of*

authority to regulate natural gas cost structures. See State Opp. at 12 ("The State does not dispute FERC's 'authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states.' ") (citation omitted); County Opp. at 6 (The FERC has "broad discretion to exercise" the "regulatory power of Congress"). Respondents, nevertheless, take the astonishing position that this federal power "in no way impacts a state's ability to assess and collect taxes," *id.*, and that the FERC Order underlying this case simply is "irrelevant," State Opp. at 7.

In its petition, however, petitioner demonstrated that (1) Utah's failure to give full effect to the FERC Order establishing *nunc pro tunc* the gas rates petitioner could charge during the tax years in question violates the Supremacy Clause and this Court's precedents and (2) the Utah Supreme Court's construction of its post-deprivation tax remedy statute conflicts with this Court's decision in *Reich* v. *Collins*, 115 S. Ct. 547 (1994), and leaves the state without "meaningful backward-looking relief" as required by the Due Process Clause. Utah's response is to ignore the constitutional problems it has created and baldly to claim freedom from federal "interference." State Opp. at 11; County Opp. at 6.

1. The FERC Order determining the proper gas rates that petitioner could charge manifestly is federal law entitled to unflagging respect by Utah under the Supremacy Clause. Respondents reject the application of this fundamental constitutional precept, arguing, without supporting authority, that "[t]he FERC order is not a 'federal law.' "

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its receipts."). Furthermore, the Utah Supreme Court amended its opinion in this case in response to petitioner's arguments that its "interpretation of section 1321 . . . deprives the taxpayer of a post-deprivation remedy to which it is entitled, in violation of due process guarantees under the United States Constitution." Petition for Rehearing at 7. Not surprisingly, the County does not join the State in arguing that these issues were never raised below.

Id. at 11. Yet this Court has "held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York* v. *FCC*, 486 U.S. 57, 63 (1988). Therefore, " 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law." *Id.* at 63-64 (citation omitted).

It is uncontroverted that FERC orders, and not just federal statutes or administrative regulations, can preempt state law under the Supremacy Clause. See Pet. at 8-9, citing, *inter alia*, *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (FERC Order preempted state attempt to conduct prudence inquiry). Respondents fail even to mention these cases cited by petitioner, much less attempt to explain why they do not apply. And while respondents concede the FERC's authority to regulate natural gas rates, they erroneously claim that "that power in no way impacts a state's ability to assess and collect taxes," County Opp. at 6, and that the entitlement to a state tax refund exclusively "must be decided by applying state law," State Opp. at 11. This argument ignores the fact that this Court has expressly recognized that *the payment of state taxes* is a part of the ultimate cost of service and is within the sphere of the FERC's authority. See Pet. at 8 and cases cited; see also *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 185 (1983) (state tax statute " 'interfere[d] with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers' ") (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 749 (1981)).

Respondents further attempt to confuse the Court by playing a shell game with the FERC's discrete orders, claiming that "the FERC Order" does not, by its own terms, have precedential effect. County Opp. at 3; State Opp. at 10. However, the FERC Order referred to by respondents is the Commission's *subsequent* approval of the particular terms of settlement. See Pet. App. at 22a. This Order, which includes the Commission's standard disclaimer found in literally thousands of FERC settlement approvals, is distinct from the Commission's Opinions Nos. 306 and 306-A. *Id.* at 52a-74a; 32a-51a. Whatever the significance of the FERC's disclaimer in its order approving the settlement, which itself is by no means clear, the FERC expressly found the refund settlement to be in the public interest. *Id.* at 22a. More importantly, the FERC separately found in Opinions 306 and 306-A that petitioner had not been authorized to charge incentive prices during the tax years in question, and ordered an appropriate rate adjustment.[2]

2. Having ignored the effect of the FERC Order requiring a rate adjustment, respondents glibly claim that this Court's decision in *Reich* v. *Collins*, 115 S. Ct. 547 (1994), is inapplicable. The State acknowledges that Utah Code Ann. § 59-2-1321 is Utah's "postdeprivation remedy" for taxes that are "erroneously or illegally collected." State Opp. at 12-13. The State asserts, without explanation, that the statute provides for the "backward-looking relief" it concedes is required by *McKesson Corp.* v. *Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 31

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[2] Respondents insinuate that petitioner was acting in bad faith and simply got what it deserved when its customers challenged the rates it was charging. *See* State Opp. at 1-2; County Opp. at 2 & n.1, 4 & n.5. Respondents fail to note that the FERC *upheld* petitioner's use of NGPA rates, even though CIG's customers had contested the applicability of those rates. The only rate the FERC disallowed was NGPA incentive pricing for high-cost gas from tight sand formations (such as the Natural Buttes Field in Uintah County) and deep wells.

(1990). State Opp. at 13. The limiting construction now placed on Section 59-2-1321 by the Utah Supreme Court, however, ensures that *no* meaningful backward-looking relief is provided.

Respondents agree that the only taxing errors that can be corrected after the Utah Supreme Court's decision below are those that can be determined as of January 1st of the given assessment year. State Opp. at 6-7; County Opp. at 8. This construction of the allegedly post-deprivation remedy, however, means that no state tax assessment *subsequently* found to be in violation of federal law can ever be remedied. Accordingly, either the limited construction of Section 59-2-1321 by the Utah Supreme Court is a "midcourse" modification of a post-deprivation tax remedy prohibited by *Reich* or the State of Utah provides no meaningful backward-looking relief as required by the Due Process Clause. This Court should review the decision below in order to ensure that Utah and other similarly situated states properly carry out their constitutional obligations in recognition of the legitimate and supreme federal interests in national energy resources.[3]

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[3] The State's raising of the statute of limitations issue, which it concedes was never addressed by the court below, State Opp. at 8, is a red herring since it is uncontested that petitioner promptly sought a tax refund in state court after the FERC resolved the contested gas rate issue, County Opp. at 2. The court below decided this case on the basis of the federal questions presented in the petition and the Court should decide those issues.

CONCLUSION

For the foregoing reasons, and ~~for~~ the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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